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410785—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 346

LOUISIANA DELTA CATTLE CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–11) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 11). The petition for a writ of certiorari was filed on August 4, 1941. Petitioner invokes the jurisdiction of this Court under Section 288 of the Judicial Code as amended.

We assume, however, that it meant to rely upon Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The question is whether the complaint alleges a taking, through the construction of a set-back levee pursuant to the Flood Control Act of 1928, of petitioner's land for which just compensation must be made under the Fifth Amendment. The complaint alleged:

1. The petitioner's land will be flooded and destroyed if the United States, as it intends to do, abandons or removes previously existing levees protecting petitioner's land.

2. Natural rainfall will convert the land into a bog or marsh unfit for use through lack of drainage, resulting from the construction of the set-back levee, stopping previously existing drainage outlets.

STATEMENT

Petitioner's action is one for just compensation under the Fifth Amendment to the Constitution of the United States for an alleged taking of its lands, as the result of acts undertaken by the United States pursuant to the Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. C. C., secs. 702a–702m. The court below, on the Government's motion, dismissed the petition on the ground that it failed to state a cause of action (R. 11). The facts as alleged in the petition filed in the court below (R. 1–6) are as follows:

Petitioner, a corporation organized under the laws of Louisiana, is the owner of certain tracts of land, embracing 4,663.52 acres located adjacent to or near the Mississippi River on its west side (R. 1–3). At the time of the acquisition of this property, it was protected against flood or water submergence by public levees erected upon it along the banks of the river (R. 3–4).

On or about July 13, 1931, the United States, pursuant to the Flood Control Act and the Jadwin Plan of Flood Control, selected and located a set-back or new levee line west of petitioner's land, or at least of some of it (R. 4). Work on the set-back levee was begun about September 1, 1931, and in or about July or October 1934 the levee was joined at its ends to the old levees (R. 4).

The alleged taking of property, upon which petitioner's claim is predicated, is based upon the following allegations: That the set-back levee "is intended to, does and will withdraw levee protection * * * and cause said Mississippi River permanently to overflow and destroy" petitioner's property (R. 4); that in the construction of the set-back levee "drainage outlets previously existing were stopped and made ineffective" (R. 4); and that by the construction of the set-back levee the United States has excluded petitioner's land from levee protection and drainage, whereby the land, "through lack of drainage, will be inundated by the natural rainfall * * * and converted into a bog or marsh unfit for cultivation

or other use, and whereby, in event of abandonment or removal of the previous levees around said property, which abandonment or removal * * * defendant purposes to accomplish and obtain," the river will permanently overflow petitioner's land (R. 4–5). In paragraph VI of the petition it is generally alleged that the United States "has deprived and does deprive" petitioner of levee and drainage protection previously existing; that it "has exposed" the lands to river overflow; and that it "has caused and does cause the land * * * to be and remain unprotected, to be overflowed and destroyed * * *" (R. 5).

Alleging that the acts of the United States have rendered its lands, with improvements, valueless and that prior to the construction of the set-back levee they were worth $159,002.05, petitioner seeks compensation in that amount, plus interest (R. 5, 6).

ARGUMENT

In dismissing the petition for failure to state a cause of action, the court below correctly followed the rule of *United States* v. *Sponenbarger,* 308 U. S. 256, and *Danforth* v. *United States,* 308 U. S. 271.

The alleged taking of petitioner's land is merely prospective, being based, in substance, upon the allegations (1) that the land will be overflowed by the river when the intended abandonment or removal of the old levees is effected; and (2) that the land will become a bog or marsh through lack of drainage.

1. While the petition includes the allegations that the set-back levee "does" withdraw levee protection from petitioner's land and cause the river permanently to overflow and destroy it (R. 4), and that the United States by its alleged acts "has caused and does cause" the land to be overflowed and destroyed (R. 5), the allegations in Paragraph V clearly indicate that the land will be overflowed only in the event that the old levees are abandoned or removed (R. 4–5). There is no allegation as to how the construction of the set-back levee could have resulted in overflowing petitioner's land, and, in the absence of any lowering, crevassing, or removal of the old levees, it would seem that "the land is as well protected from destructive floods as formerly." *Danforth* v. *United States,* 308 U. S. 271, 286.

The alleged intended abandonment or removal of the old levees, and the alleged consequent flooding of petitioner's land, "might never occur for many reasons" and petitioner is not entitled to compensation for an "apprehended flooding." *United States* v. *Sponenbarger,* 308 U. S. 256, 267–268; *Danforth* v. *United States,* 308 U. S. 271, 286. See *Bennington County Sav. Bk.* v. *United States,* 91 C. Cls. 160; *Albert C. Kirch* v. *United States,* 91 C. Cls. 196.[1] The speculative character of peti-

[1] In support of its claim, petitioner cites a bill which authorized payment of compensation for lands left unprotected on the river side of set-back levees (Pet. 9–10, 17–21). However, the bill was vetoed by the President (Pet. 22).

tioner's apprehension is enhanced by the facts noted in the *Sponenbarger* case that the right of self-defense against floods through locally built levees has not been taken away by the Flood Control Act of 1928 and that the War Department has treated the Act as leaving local interests free to raise proposed fuse plug levees if they wish. 308 U. S. at 268, 269.

2. Petitioner's allegation that through lack of drainage its land "will be inundated by the natural rainfall * * * and converted into a bog or marsh" (R. 4) is on its face an assertion merely of prospective damage. Hence the *Sponenbarger* and *Danforth* cases are equally decisive as to it. The petition in the court below contains no allegation that the alleged stoppage of drainage outlets existing prior to the construction of the set-back levee had in fact resulted in any inundation or other damage. Cf. *Bennington County Sav. Bk.* v. *United States, supra.* Since the drainage outlets allegedly were stopped in July or October 1934 (R. 4), and since the petition below was not filed until June 1937 (R. 1), there were thus nearly three years during which, it may be inferred, the injury apprehended by petitioner did not occur.[2] See *Albert C. Kirch* v. *United States,* 91 C. Cls. 196, 203.

[2] In its argument in support of its petition for certiorari petitioner implies that the conversion of its land into a bog is an accomplished fact (Pet. 11, 13). But the petition below contains no such allegation.

3. Petitioner's attempted distinction of the *Sponenbarger, Danforth,* and other cases relied on by the court below is without merit, as is its claim that the decision below conflicts with certain decisions of this Court. In two of the latter cases the damage had taken place and consequently a taking had been effected. *United States* v. *Lynah,* 188 U. S. 445, 449–450; *United States* v. *Welch,* 217 U. S. 333, 338. In the third case cited, this Court held that the repeated invasions of the land disclosed an abiding purpose on the part of the United States to create a servitude. *Portsmouth Co.* v. *United States,* 260 U. S. 327, 329. No such invasions are alleged here.

CONCLUSION

The decision below is correct and accords with the recent pronouncements of this Court. There exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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